2001

State of Utah v. Irvin Paul Dunsdon : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent, No. 14243

vs.

IRVIN PAUL DUNSDON,

Defendant-Appellant.

AMENDED BRIEF OF APPELLANT

Appeal from the Seventh Judicial District in and for Carbon County, State of Utah, the Honorable Edward Sheya, Presiding.

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I.

THE UTAH STATUTES REIMPLEMENTING THE DEATH PENALTY DO NOT MEET THE REQUIREMENTS SET FORTH IN GREGG V. GEORGIA, PROFFITT V. FLORIDA, AND JUREK V. TEXAS.

The United States Supreme Court has declared that direct review by Appellate Courts of the appropriateness of each death sentence case is a crucial procedure which must be employed in any capital punishment scheme in order to satisfy the requirements of Furman v. Georgia.[1]

In these cases, the Supreme Court reaffirmed the principles first announced in Furman v. Georgia, 408 U.S. 238 (1972). As Justice Stewart stated in Gregg v. Georgia:

> "Furman mandates that where discretion is afforded a sentencing body on a matter so grave or the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary or capricious action." 96 S. Ct. at 2932.

In Gregg v. Georgia, Justice Stewart, in announcing the judgement of the court, stated that because of the uniqueness of the death penalty, it cannot be imposed under any sentencing procedure that creates a substantial risk that it may be inflicted in an arbitrary or capricious manner. In reviewing the capital penalty statute of the State of Georgia, the court, at several

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1. Gregg v. Georgia, ____ U. S. ____, 96 S.Ct. 2909 (1976); Proffitt v. Florida, ____ U. S. ____, 96 S.Ct. 2960 (1976); Jurek v. Texas, ____ U. S. ____, 96 S.Ct. 2950 (1976); Woodson v. North Carolina, ____ U. S. ____, 96 S.Ct. 2978 (1976); Roberts V. Louisiana, ____ U. S. ____, 96 S. Ct. 3001 (1976).

points in the opinion, emphasized the function of the special expedited direct review of capital cases which was followed by the Georgia Supreme Court. A plurality of the Justices acknowledged that these special review procedures constituted an important additional safeguard to check the possibility of the random or arbitrary imposition of the death penalty.[2]

Under the law of Georgia, the appellate court is required by statute to automatically review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to sentences imposed in similar cases.[3] The Georgia Supreme Court in Coley v. State, 231 Ga. 829, 204 S. E. 2d 612 (1974) has held that a death sentence will be set aside on the appellate level if excessive in light of comparative sentences imposed for similar cases.

The Court placed great emphasis on the ability of the Georgia Supreme Court to determine in each case whether the death sentence is excessive or disproportional. As Justice Stewart stated:

> "The proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. 96 S. Ct. 2940."

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2. See the concurring opinion of Justice White, with whom the Chief Justice and Mr. Justice Rehnquist joined.

3. Georgia Code Ann. Section 27-2537(c) (Supp. 1975).

In Proffit v. Florida,[4] the death penalty statute of Florida provides for sentencing in all cases by the trial judge instead of a jury and required automatic review by the Supreme Court of Florida of all death sentence cases.[5] The trial judge, not the jury, in sentencing under Florida's system must justify the imposition in every case of the death sentence with written findings to the State Supreme Court. In State v. Dixon, 283 So. 2d 1 (1973), the Florida Supreme Court held that they had the duty on appellate review of capital cases that went beyond the scope of review in other criminal cases. The court stated that Supreme Court review should guarantee that aggravating and mitigating reasons present in one case lead to a similar result to that reached under similar circumstances in another case and the appellate court must determine whether or not the punishment of death in any individual case is too great.

The United States Supreme Court in upholding the Florida death penalty scheme under Furman placed great emphasis on these review procedures. The Court stated that the conscientious review by a court with state-wide jurisdiction

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4. Supra, Page 1.

5. Fla. State. Ann., Sec. 921.141(4) (Supp. 1976-1977).

would assure the consistency, fairness, and rationality that would prevent the imposition of the death sentence in an arbitrary or capricious manner. The Court noted that because the procedure developed by the Florida court, the Florida court had in effect adopted the type of proportionality review mandated in the Georgia statute at issue in Gregg.[6]

In Texas, the conviction of death is subject to automatic review by the Texas Court of Criminal Appeals.[7] In Smith v. State,[8] the Court of Appeals of Texas examined carefully the death sentence imposed in that case as to the appropriateness of its imposition in light of the prior history of the defendant. In Jurek v. Texas the Supreme Court found that the Texas appellate procedure provided means which would promote the evenhanded, rational, and consistent imposition of the death penalty in that state.

In Woodson v. North Carolina, supra, the United States Supreme Court held that the death sentence as applied in North Carolina was unconstitutional because the mandatory death penalty system violated the Eighth and Fourteenth Amendments. An important factor in this decision by the court was the absence in North Carolina of the proper appellate review process. In North Carolina the court found that neither

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6. Proffitt v. Florida at 96 S. Ct. 2960 (1976).

7. Texas Code of Criminal Procedure Article 37.071 (1973).

8. No. 49,809 (Feb. 18, 1976).

at the trial or appellate level could the judiciary check the arbitrary and capricious exercise of the sentencing in death penalty cases.[9]

The Utah statutes, Utah Code Annotated 76-3-206 and 76-3-207 (Supp. 1975) do not outline an appellate review process which meets the requirements of the Eighth and Fourteenth Amendments to the United States Constitution. Under the scope of review employed in the State of Utah in criminal cases, this court has no means to promote the evenhanded, rational, and consistent imposition of the death penalty on a statewide basis. Furthermore, the appeal procedure in Utah is discretionary, not mandatory and automatic as in each of the three cases before the Supreme Court.

Therefore, the sentence of the appellant imposed under their capital punishment statutory scheme is unconstitutional and should be reversed.

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9. See also, Roberts v. Louisiana, supra, at 96 S. Ct. 3007 re appellate review.

II.

POINT II. THE DEATH PENALTY IS UNCONSTITUTIONAL UNDER THE FOURTEENTH AMENDMENT BECAUSE IT DOES NOT SERVE A COMPELLING STATE INTEREST WHICH COULD NOT BE FULFILLED BY A LESS DRASTIC MEANS

The appellant hereby incorporates Point II of original brief.

III.

POINT III. APPELLANT'S DEATH SENTENCE WHICH IS UNCONSTITUTIONAL SHOULD BE REVERSED, AND PURSUANT TO UTAH CODE ANNOTATED 76-3-207 (4) SHOULD BE REMANDED TO THE TRIAL COURT FOR THE APPELLANT TO BE SENTENCED TO LIFE IMPRISONMENT

The appellant hereby incorporates Point III of original brief.

AMENDED IV

A) THE SENTENCE OF DEATH SHOULD BE REVERSED BECAUSE THE SENTENCE IN THIS PARTICULAR CASE IS DISPROPORTIONATE AND EXCESSIVE IN RELATION TO THE OFFENSE FOR WHICH THE DEFENDANT WAS CONVICTED AND THE DEFENDANT'S INVOLVEMENT IN THAT OFFENSE.

B) THE APPELLANT'S SENTENCE OF DEATH SHOULD BE REVERSED BECAUSE THE EVIDENCE DOES NOT SUPPORT THE TRIAL JUDGES IMPOSITION OF THE DEATH PENALTY.

C) THE EVIDENCE PRESENTED AT THE TRIAL WAS INSUFFICIENT TO WARRANT IMPOSITION OF FIRST DEGREE MURDER.

The appellant submits that if the court should find that the death penalty statute in Utah is not per se unconstitutional, the aforementioned recent decisions by the Supreme Court require that this court exercise the type of special, direct review of death penalty cases specified by the Supreme Court.

As outlined in Amended Point I of this brief, a mandatory, special, direct review of the appropriateness of each individual death sentence is a crucial procedure that must be employed to satisfy the Eighth and Fourteenth Amendments.

Paragraph (3) of Utah Code Annotated 76-3-207 (Supp. 1975) provides:

> "Upon any appeal by the defendant where the sentence is of death, the supreme court, if it finds prejudicial error in the sentencing proceeding only, may set aside the sentence of death and remand the case to the trial court, in which event the trial court shall impose the sentence of life imprisonment."

Under the above quoted section, this court has the ability to exercise the obligation placed upon state appellate courts by the United States Supreme Court to assure that the death penalty in Utah is not inflicted in an arbitrary or capricious manner. By reviewing each case in which the penalty of death is imposed, this court can determine whether in fact the sentence of the individual defendant is or is not disproportional to the offense committed. In each case the court should review the sentence in light of the circumstances of the crime, the aggravating and mitigating factors present, and other sentences for similar crimes. The court by employing "proportionality review" can substantially eliminate the possibility that a person will be sentenced to die by the action of an arbitrary or capricious manner.

This court also has the duty to carefully review the entire trial and sentencing procedure of each death penalty case and to reverse the death sentence if any prejudicial error is found by the court in any phase of the trial. As the United States Supreme Court stated in Gregg:

> "There is no question that death as a punishment is unique in its severity and irrevocability... When a defendant's life is at stake, the court has been particularly sensitive to insure that every safeguard is observed. 96 S. Ct. at 2932.

The Utah Supreme Court has traditionally employed a special review standard in capital cases. State v. Riley, 41 Utah 2d 225, 126 P. 294 (1911); State v. Stenback, 78 Utah 350, 2 P. 2d 1050 (1931); State v. Russell, 106 Utah 116, 145 P.

2d 1003 (1944); and State v. Materi, 119 Utah 143, 225 P. 2d 325 (1950). In these cases the court has held that it has a duty to review the entire record that does not exist in ordinary criminal appeals, and will raise questions of error on its own motion. In State v. St. Clair, 3 Utah 2d 230, 282 P. 2d 323 (1955) this court said:

> "Under such circumstances (a capital case) it is our duty to scrutinize with care the propriety of all aspects of the proceedings. at 332."

The court expressed this concept again in State v. Poe, 21 Utah 2d 113, 441 P. 2d 512 (1968) in another manner in reversing one defendant's death sentence:

> "... with the defendant's life at stake, this court should not hazard a guess. The [evidence at issue] could very well have tipped the scales in favor of the death penalty" at 515.

In light of the foregoing standards of review the appellant submits: (1) That the penalty of death in appellant's case is disproportionate and excessive in relation to the offense which the defendant was convicted and the defendant's involvement in the offense; (2) The evidence introduced at the trial and hearing and sentence does not support the sentence of death in light of the mitigating factors present in appellant's case.

In the appellant's case, the trial judge sentenced all of the defendants to death primarily on the basis of the fact that the crime itself was "brutal, malicious and ruthless". Judge Sheya in announcing his decision said:

> "if this is not a case warranting death, . . . when you consider the facts that a man was murdered, taken out of his bed, practically at midnight without any justification, cause or excuse, whatsoever, and murdered in the manner that this man was, ruthlessly and brutally, it is hard to imagine a case that would warrant the death penalty." (T650)

The brutality or heinousness of the crime, which so influenced the trial judge is not an aggravating circumstance which the Utah legislature has specified as a condition warranting the imposition of first degree murder or an aggravating factor to be considered in sentencing.

The only statutorily enumerated aggravating factor which was involved in this case is that the homicide was committed while the actor was engaged in a kidnapping. However, the evidence indicates that any kidnapping or detention of the victim was merely incidental. If not for the detention and transportation of the victim before the homicide the crime would not have been elevated to first degree murder from second degree and the appellant would not now be facing the death penalty. This is not the usual case of a kidnapping where a collateral homicide is accomplished to facilitate the kidnapping.

On the other hand, the following evidence of statutory mitigating factors was introduced during the trial and hearing on sentence by the defense.

<u>The appellant, Irvin Dunsdon, did not have any significant history of prior criminal activity.</u> During the hearing, the appellant testified that at the time of the

incident he was employed and was working as a journeyman painter. (T. 580) The appellant testified that his only previous criminal conviction was for a misdemeanor of being an accessory after the fact of theft in Indiana. (T. 599) The State offered no evidence of any other previous criminal activity by the appellant and thus this mitigating factor stands unrebutted.

The trial court did not have before it the accurate sentencing information which the Supreme Court in Gregg v. Georgia said was an indispensable prerequisite to a reasoned determination of whether the defendant should live or die. 96 S. Ct. at 2933. If the appellant had committed a felony on the Third Degree the court would have had substantially more information through the pre-sentence report procedure normally available to the court.

At the time of the murder, the capacity of the appellant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired as the result of intoxication by both alcohol and drugs. The evidence showed that the apellant prior to the party which they attended on April 8, 1975, had smoked three "joints" of marijuana with his girlfriend. (T. 582) At the party he testified that he had consumed about 10 cups of beer during the course of the evening. (T. 582) Also, he had taken four of the "valium" pills at the party. (T. 582) The appellant stated on cross-

examination that "we was both pretty high...We was stumbling and staggering all night during the whole thing". (T. 393) He also testified that he had trouble driving the truck. The fact that there was a great quantity of both drugs and alcohol at the party on the evening of April 8 and that the appellant was drinking and taking pills was corroborated by the testimony of several witnesses. (T. 492, T. 493, T. 508). Furthermore, an expert called by the defense testified that the effect of the drugs taken and alcohol consumed (was) would be exaggerated because they were combined. (T. 544) He testified that the combination of beer and "valium" usually results in abnormally aggressive behavior and a distortion of judgment. (T. 545)

The only evidence offered by the prosecution to negate this evidence was the testimony of several of the police officers who were present when the defendants were subsequently arrested on the morning of April 9, after the affects of the drugs and alcohol had dissipated.

The evidence clearly shows that the appellant's actions on the morning of April 9 were substantially impaired as the direct result of his intoxicated state. Section 76-3-208 (1) (d) of the capital punishment provisions is unique in its consideration for voluntary intoxication in the Utah Criminal Code. The general rule as stated in Utah Code Annotated 76-2-306 (Supp. 1975) is that voluntary intoxication is not a defense unless it negates the existence of the necessary mental state.

Utah does not mitigate first or second degree homicide on the basis of "diminished capacity" resulting from intoxication. C. F. Utah Code Annotated 76-5-205 (Supp. 1975). The uniqueness of Section 76-3-208(1) (d) indicates a legislative intent that the severity of the penalty of death should be mitigated by the fact of substantial intoxication in sentencing even when voluntary intoxication would not be available to mitigate the finding of guilt.

The appellant was an accomplice in the murder committed by the defendant, Marvel, and his participation was relatively minor. The appellant never intended to kill the victim when he went to his home. (T. 590) He admitted when he was on the stand that he had intended to "maybe punch him around a bit", when they went to Hogan's house. (t. 587) He testified that on the evening of April 8 he struck the victim and he had "fell" to the ground. (T. 588) The appellant testified that as the victim was running down the driveway, Craig Marvel shot the defendant. (T. 588) This was the first time he realized that something other than a fist fight was taking place. (T. 590) The testimony of the other defendants corrobate the fact that there was no planning or premeditation of the shooting that evening. After the shot was fired, the appellant testified that he was "paranoid and scared" and thought the victim was dead. (T. 588) While the shots were being fired in the canyon by Marvel, the appellant was turning the truck around in the snow. (T. 595)

The evidence shows that the appellant was unwittingly involved in an incident which he had not anticipated or planned. Furthermore, the degree of his involvement as an accomplice should be viewed in light of his intoxicated condition.

The appellant submits that the trial court committed prejudicial error in finding the appellant guilty of First Degree Murder and in sentencing the appellant to death. Furthermore, the appellant submits that his is not a case for the imposition of the death penalty.

Therefore, the court should reverse the judgement of the lower court and either remand the case for retrial or set aside the death penalty.

Respectfully submitted,

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ROBERT VAN SCIVER

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RANDALL T. GAITHER